Supreme Court, U.S.
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No. 91-93 (2)

In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

v.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

**On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
Counsel of Record

EDWARD S. MARION
Special Assistant
Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Respondent

QUESTIONS PRESENTED

1. Is the governor of a state absolutely immune from suit under 42 U.S.C. § 1983 for actions taken in the exercise of the veto power?

2. Is an action to nullify state statutes barred by the eleventh amendment?

3. Do state legislators have standing to sue a governor over an exercise of the veto power which does not prevent them from voting to override?

4. Where, in a prior action for the same relief, petitioners chose not to raise available claims, and where granting them the relief they subsequently request would seriously disrupt the administration of government, are petitioners barred from bringing the subsequent action under the doctrines of laches and issue preclusion?

5. Is petitioners' claim that a governor's exercise of the veto power violates the United States Constitution's Guarantee Clause a non-justiciable question?

6. Where the entirety of petitioners' claims amount to a challenge to a state constitution's allocation of legislative

power among the branches of government, does the complaint fail to state a claim upon which relief can be granted?

7. Does the Wisconsin Constitution violate the Guarantee Clause because the Legislature cannot override a veto without a two-thirds vote regardless of whether the veto was "affirmative" or "negative" ?

8. Does the Wisconsin Constitution violate state legislators' first or fourteenth amendment rights because of the two-thirds override requirement?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

There is no case nor controversy under article III of the United States Constitution. In addition, petitioners' claims are barred, in part, by the eleventh amendment.

STATEMENT OF THE CASE

This is an action by two Wisconsin state legislators against the Governor of Wisconsin. Senator Risser and Representative Travis asked the district court to declare that the partial veto power of the Wisconsin Governor violates the United States Constitution and that Governor Thompson's exercise of his state constitutional power violated their civil rights. They sought an injunction against the future exercise of the partial veto power and the invalidation of previously partially-vetoed legislation. The district court denied their motion for partial summary judgment and granted the Governor's motion for complete summary judgment. The court of appeals affirmed.

Senator Risser sues as the president of the Wisconsin Senate, a member of the Democratic Party of Wisconsin, a member of the Senate Democratic Caucus and as a resident and taxpayer. Representative Travis sues as a member of the Wisconsin Assembly, a member of the Democratic Party of Wisconsin, a member of the Assembly Democratic Caucus and as a resident and taxpayer.

As members of the Legislature, petitioners participated in the passage of certain appropriation bills which were vetoed in part by Republican Governor Thompson pursuant to Wisconsin Constitution article V, section 10. Some of the vetoes alleged herein to be unconstitutional occurred in 1987. These vetoes were upheld by the Wisconsin Supreme Court in litigation instituted by Senator Risser and the Wisconsin Legislature. *Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (*"Veto I"*).

The people of Wisconsin ratified a constitutional amendment to the Governor's partial veto power on April 3, 1990. Senator Risser and Representative Travis were the lead sponsors of 1989 Wisconsin Senate Joint Resolution 11, which authorized the public referendum on the proposed amendment. The constitutional amendment only modestly cut back on the Governor's partial veto power by prohibiting the creation of a new word by the rejection of individual letters in the words of an appropriation bill. Wis. Const. art. V, § 10(1)(c). Although sponsored by Senator Risser and Representative Travis,

the amendment did not attempt to trim the Governor's veto power in any other respect (including the ability to veto digits, words and phrases, devices challenged by Senator Risser and the Legislature in *Veto I*, or what Senator Risser and Representative Travis characterize in this suit as "negative" vetoes).

The present litigation is not limited to the "creative" (and admittedly controversial) vetoes upheld in *Veto I*. Petitioners are challenging partial vetoes which are standard fare throughout the nation and which have been upheld in Wisconsin in the face of numerous legal challenges dating back to 1935.

REASONS FOR DENYING THE PETITION

I. THE PETITION PRESENTS NONE OF THE REASONS STATED IN SUP. CT. R. 10.

The decision of the court of appeals does not conflict with a decision of any other United States Court of Appeals on a similar subject. Neither does the decision conflict with any decision of this Court. On the contrary, the

decision is entirely consistent with the pronouncements both of this Court and the Seventh Circuit.

While novel and imaginative -- if not frivolous[1] --, petitioners' claims do not raise important questions of federal law.

II. PETITIONERS SUED THE WRONG PERSON.

As the court of appeals held, *Risser v. Thompson*, 930 F.2d at 551, petitioners sued the wrong person. As a government official exercising legislative power, the Governor is absolutely immune from suit under 42 U.S.C. § 1983. *See Supreme Court of Virginia v. Consumers Union, Etc.*, 446 U.S. 719, 731 (1980) (state high court judges are immune from suit when exercising their rule-making power); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (the veto of a governor is a part of the "legislative process").

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[1]The court of appeals held that petitioners' suit had "no possible merit." *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991).

No court that we know of has held that a governor exercising the veto power is not acting in a legislative capacity and so entitled to absolute immunity. The court of appeals in *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193–94 (5th Cir. 1981), held that a mayor was immune from a suit challenging his veto of a proposed city ordinance.

III. PETITIONERS RAISE A NON-JUSTICIABLE QUESTION.

Since *Luther v. Borden, et al.*, 7 How. 1 (1849), suits under article IV, section 4 of the United States Constitution (the Guarantee Clause) have been held non-justiciable. So well-established was the proposition that in *Taylor v. Beckham*, 178 U.S. 548, 578 (1900), the Court stated: "It was long ago settled that the enforcement of [the guarantee of a Republic form of government] belonged to [the Congress]." *Accord, O'Neill v. Leamer*, 239 U.S. 244, 248 (1915), *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U.S. 118, 142–43 (1911).

Petitioners' effort to breathe justiciability back into the Guarantee Clause consists of arguing that *Baker v. Carr*, 369 U.S. 186 (1962), somehow forged an exception to *Luther v. Borden*. Yet *Baker v. Carr* itself held that Guarantee Clause disputes were non-justiciable as were other constitutional claims enmeshed therewith. *Baker v. Carr*, 369 U.S. at 216-26, 228.

IV. EVEN IF JUSTICIABLE, PETITIONERS' GUARANTEE CLAUSE CLAIM IS SO CLEARLY UNSUPPORTED THAT IT DOES NOT MERIT THIS COURT'S REVIEW.

This case is about the procedures for enactment of a state statute. This is a question of state law only. *Duncan v. McCall*, 139 U.S. 449, 461-62 (1891). Petitioners, state legislators, complain about the Wisconsin Constitution's allocation of power among the branches of state government. Such allocation is for Wisconsin to decide. *See Mayor of City of Phila. v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not

impose on the States any particular plan for the distribution of governmental powers").

Petitioners' argument about the peoples' right to be governed by their "representatives" overlooks the fact that the Governor is more a representative of the people of Wisconsin than is any legislator. The Court stated in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), that the president represents all of the people because his constituency is nationwide. Similarly, the Governor represents all of the people of his state because his constituency is statewide. As the Court recently stated, elected judges are representatives of the people under the ordinary meaning of the word as describing "someone who has prevailed in a popular election." *Chisom v. Roemer*, 59 U.S.L.W. 4696, 4701 (June 20, 1991).

V. WISCONSIN'S PARTIAL VETO POWER DOES NOT VIOLATE ANY OTHER CONSTITUTIONAL PROVISION.

In *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977), the court of appeals characterized claims similar to petitioners' as "nonsense" and their arguments as "non-sequiturs." Petitioners have cited no authorities calling into question this description.

CONCLUSION

Petitioners decry the advent of despotism in Wisconsin. The court of appeals responded:

> A government is not monarchical or aristocratic merely because its chief executive is empowered to cross out words in an appropriations bill. In analogizing the governor of Wisconsin to the kings of England, and the legislature of Wisconsin to the

> Parliaments that struggled against royal prerogative in the eighteenth century, the plaintiffs merely give analogy a bad name.

Risser v. Thompson, 930 F.2d at 552.

The petition should be denied.

Dated this 14th day of August, 1991.

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
Counsel of Record

EDWARD S. MARION
Special Assistant
Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Respondent